

Creation of tenancy (s232) in public housing

Background

The Supreme Court has recently affirmed VCAT's discretion to take into account the hardship of the Director of Housing in assessing creation of tenancy matters. Creation of tenancy matters are heard under s232 of the Residential Tenancies Act 1997 (RTA).

Previously our focus had been on showing severe hardship to our client; however it is now also essential to show how the Director will NOT be caused hardship by granting a tenancy to the client.

What is the issue?

Realistically, VCAT will need to be persuaded that it would not cause significant hardship to the Director for a person residing at a property to remain as a tenant. Considering the Tribunal is creating an on-going tenancy interest for the applicant, it has been our experience that VCAT takes this very seriously.

This Practice Note sets out the type of situations in which consideration of a creation of tenancy application should be made.

There are a number of legal arguments about the Director's hardship that will need to be developed for such an application. This Practice Note does not discuss those arguments and you should seek further advice if the matter is proceeding to a VCAT Hearing.

It should be noted that where there is a compelling case for creation of tenancy, the Office of Housing has normally granted the tenant the transfer without needing to make a creation application.

The factors that we consider relevant generally arise from the Office of Housing's Transfer of Tenancy Policy. Where a person residing at an Office of Housing property seeks to transfer the tenancy from the original tenant to themselves, they need to meet certain criteria. The Office of Housing will not grant the transfer if they applicant does not meet these and the policy states that the applicant should be referred to VCAT to make an application under s 232 of the RTA, because the Office of Housing does not have discretion to grant it.

These factors are:

1. Eligibility for public housing;
2. Connection to the local area;
3. Appropriate house size;
4. Residency.

In addition, it will be relevant whether the tenant is on a priority waiting list.



What should you do?



An application should not be made for someone who is not eligible for public housing due to their income. They will be very unlikely to succeed in an application for creation of tenancy.

However, there are some circumstances where this rule may not apply, such as where the prospective tenant is on the waiting list but has a temporary increase in their income.

An application should be made for those clients:

1. Who meet the income eligibility requirement for the provision of housing by the Office of Housing
2. Who meet some or all of the following:
 - a connection to the local area; or
 - the property being a roughly appropriate size.
3. Who are a resident, or if not a resident, are able to show that they have been there with the consent or knowledge of the Office of Housing. Ideally the client should have been a resident for at least three months prior to the termination of the tenancy.

What are the essential steps for a potential s 232 application?

(1) Has the Director terminated the tenancy properly?

Where the s 232 application arises in relation to the death of the original tenant, it is important to check whether the Office of Housing has properly terminated the tenancy. The most common cause for creation of tenancy matters is the death of the previous tenant. Section 228 of the RTA sets the legal framework, and the Deceased Tenants Policy sets out the procedure Office of Housing must follow to terminate a tenancy following the death of the tenant. Usually the tenancy terminates 28 days after the Office of Housing receives formal notification of the death of the tenant, but it is important to check the relevant documents and policies in each case.

(2) Has the client applied for a transfer?

The transfer policy sets out the circumstances where a resident may be accepted for transfer of the tenancy into their name (see above). A resident who does not meet these criteria may still apply for a transfer, and appeal the outcome of the transfer. Appeals can be successful and may resolve the matter at this stage.

(3) Has the client applied for Office of Housing, and are they eligible for priority housing?

If the client is eligible for priority housing this will be important evidence for the Tribunal in two respects. Firstly it shows the client has likely been assessed as experiencing some time of hardship related to their housing circumstances above and beyond that of an average tenant, and secondly it can be used to argue that the hardship to the Office of Housing is diminished if they are housing someone who is eligible, and has priority.

(4) Connection with the local area?

Obtain as much evidence as possible of the client's connection with the local area. Doctors and other support and social services, community groups, religious groups, family, etc. Close proximity to family and support services is especially relevant when the applicant is from a non-English speaking background or is a recently arrived immigrant.

(5) Is there any other evidence to access?

Can the client make an application to Office of Housing under FOI or administrative release criteria for release of relevant documents, especially any documents related to their relationship to the property. Sometimes clients have slipped off the waiting list because they have failed to respond to correspondence and they are still within the time limit to re-apply.

(6) Administrative law approach?

Is it a case where it may be worth pursuing a broader administrative law approach under the *Charter of Human Rights & Responsibilities Act 2006 (VIC)*. We have sample correspondence to the Director of Housing related to requesting reasons under the Administrative Law Act for their decision to withdraw the license for a person to reside at the premises. You should seek further advice if you want to proceed with an administrative law approach. It is worth noting that, to our knowledge the Director of Housing has never been the subject of a successful administrative law appeal.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific case and you require advice, then you should contact us on **(03) 9411 1444**

Tenants Union Legal Team**References**

Tenancy Management Manual - Transfer of Tenancy Policy (version 3.2 May 2010), Office of Housing.

Terminating Tenancies & Deceased Estates Policy (version 4.1 September 2009), Office of Housing.

Illegal Occupancy and Squatters Policy (version 3.1 September 2009), Office of Housing.